

UNITED STATES OF AMERICA, Plaintiff, v. ERNESTO GUTIERREZ-CORTEZ (2), Defendant.	CASE NO. 10cr4142 JM ORDER DENYING MOTION FOR REDUCTION OF SENTENCE
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BACKGROUND

10cr4142(2)

1 Court sentenced him to 87 months custody, followed by 5 years of supervised release.

2 To arrive at this sentence, the Court calculated a base offense level of 34, based
3 upon 432.4 grams of actual methamphetamine, reduced 3 levels for Acceptance of
4 Responsibility, departed 2 levels for Fast Track under § 5K2.0, and then varied an
5 additional 4 levels under 28 U.S.C. § 3553(a). Defendant's criminal history Category
6 was IV, and at a guideline level of 25, his sentencing range was 84-105 months. The
7 Court then imposed a custodial sentence of 87 months.

8 DISCUSSION

9 Under 18 U.S.C. § 3582(c)(2), district courts have the authority to modify a term
10 of imprisonment when a defendant was sentenced based on a guideline range that is
11 subsequently lowered by amendment to the USSG. When determining whether a
12 sentencing adjustment is warranted pursuant to § 3582(c)(2), the court must "determine
13 the amended guideline range that would have been applicable to the defendant if the
14 amendment(s) ... had been in effect at the time the defendant was sentenced." USSG
15 § 1B1.10(b)(1). "The court shall substitute only the [applicable amendment] for the
16 corresponding guideline provisions that were applied when the defendant was
17 sentenced and shall leave all other guideline application decisions unaffected." *Id.* If
18 the amendment does not lower the guideline range under which the defendant was
19 sentenced, a reduction in sentence is not authorized. USSG § 1B1.10(a)(2).

20 Amendment 782 modified the Drug Quantity Table in USSG § 2D1.1, which
21 provides the base offense levels for different quantities of various controlled
22 substances. Amendment 782 reduced the base offense levels for most federal drug
23 trafficking crimes by two levels. In July 2014, the U.S. Sentencing Commission
24 promulgated Amendment 788 and amended USSG § 1B1.10, which made Amendment
25 782 retroactive (effective November 1, 2014) but delayed until November 1, 2015 the
26 effective date for orders reducing prison terms based on Amendment 782.

27 "[T]he court shall not reduce the defendant's term of imprisonment under
28 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the

1 minimum of the amended guideline range determined under subdivision (1) of this
 2 subsection.” USSG § 1B1.10(b)(2)(A). The commentary to § 1B1.10 clarifies that the
 3 “[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an
 4 amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the
 5 guideline range that corresponds to the offense level and criminal history category
 6 determined pursuant to §1B1.1(a), which is determined before consideration of any
 7 departure provision in the Guidelines Manual or any variance).” USSG § 1B1.10 cmt.
 8 n.1(A).

9 In Dillon v. United States, 130 S. Ct. 2683, 2691 (2010), the Supreme Court
 10 explained the limited nature of § 3582(c)(2) proceedings and the process for ruling on
 11 motions to reduce sentences under that section.

12 Consistent with the limited nature of §3582(c)(2) proceedings,
 13 §1B1.10(b)(2) also confines the extent of the reduction authorized. Courts
 14 generally may “not reduce the defendant’s term of imprisonment under
 15 18 U. S. C. §3582(c)(2) . . . to a term that is less than the minimum of the
 16 amended guideline range” produced by the substitution.
 17 §1B1.10(b)(2)(A). Only if the sentencing court originally imposed a term
 18 of imprisonment below the Guidelines range does §1B1.10 authorize a
 19 court proceeding under §3582(c)(2) to impose a term “comparably” below
 20 the amended range. §1B1.10(b)(2)(B).

21 The Supreme Court required district courts to follow a two-step process in ruling on
 22 motions under § 3582(c)(2). The Supreme Court cautioned that “[f]ollowing this
 23 two-step approach, a district court proceeding under §3582(c)(2) does not impose a
 24 new sentence in the usual sense.” Id. Furthermore, “proceedings under 18 U.S.C.
 25 § 3582(c)(2) and this policy statement do not constitute a full resentencing of the
 26 defendant.” USSG § 1B1.10(a)(3). The two-step process provided by Dillon, 130 S. Ct.
 27 at 2691-92, is as follows:

28 At step one, §3582(c)(2) requires the court to follow the Commission’s
 instructions in § 1B1.10 to determine the prisoner’s eligibility for a
 sentence modification and the extent of the reduction authorized.
 Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing]
 the amended guideline range that would have been applicable to the
 defendant” had the relevant amendment been in effect at the time of the
 initial sentencing. “In making such determination, the court shall
 substitute only the amendments listed in subsection (c) for the
 corresponding guideline provisions that were applied when the defendant
 was sentenced and shall leave all other guideline application decisions

1 unaffected.” At step two of the inquiry, §3582(c)(2) instructs a court to
 2 consider any applicable §3553(a) factors and determine whether, in its
 3 discretion, the reduction authorized by reference to the policies relevant
 4 at step one is warranted in whole or in part under the particular
 circumstances of the case. Because reference to §3553(a) is appropriate
 only at the second step of this circumscribed inquiry, it cannot serve to
 transform the proceedings under §3582(c)(2) into plenary resentencing
 proceedings.

5 The district court’s discretion at step two is limited. See Freeman v. United
 6 States, 131 S. Ct. 2685, 2693 (2011) (Noting that “[t]he binding policy statement
 7 governing §3582(c)(2) motions places considerable limits on district court discretion”).
 8 In Freeman, the Supreme Court further explained that “[i]n an initial sentencing
 9 hearing, a district court can vary below the Guidelines; but, by contrast,
 10 below-Guidelines modifications in §3582(c)(2) proceedings are forbidden, USSG
 11 §1B1.10(b)(2)(A), except where the original sentence was itself a downward departure
 12 [pursuant to] §1B1.10(b)(2)(B).” Freeman at 2693. As a result, this Court is not
 13 permitted to engage in a de novo resentencing in a § 3582(c)(2) proceeding and
 14 therefore, cannot grant the same departures or variances granted at the initial
 15 sentencing hearing, unless that departure was granted pursuant to a government’s
 16 motion for substantial assistance as defined by the Guidelines.

17 Here, under the Amended Guidelines, the base offense level for 432.4 grams of
 18 actual methamphetamine is level 32. After a reduction for Acceptance of
 19 Responsibility (-3) the amended adjusted offense level is 29. With Criminal History
 20 Category of IV, the guideline range is 121 to 151 months. As the original sentence
 21 included a Fast Track Departure of 2 levels and a §3553(a) variance of 4 levels, the
 22 amended guideline range is not lower than the 87 month sentence actually received by
 23 Defendant. Accordingly, Defendant is not entitled to any relief as the original sentence
 24 is less than the Amended Guideline range.

25 In sum, the court denies the motion for a reduction in sentence.

26 **IT IS SO ORDERED.**

27 DATED: November 30, 2016

28 
 JEFFREY T. MILLER
 United States District Judge

cc: All parties